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Supreme Court, U.S.
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No. 94-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

v.

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent.

– and –

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Pursuant to Rule 21.4 of the rules of this Court, Helen Kirwin Eisenmenger, Respondent (hereinafter "Eisenmenger") responds to the Motion for Leave to File Brief Amici Curiae. The motion should be denied because Amici Curiae do not bring to the attention of the Court a federal question or other relevant matters that have not already been brought to its attention by the parties.

SUMMARY OF ARGUMENT

Clearly, Amici's due process argument has already been brought to the Court's attention by Ethicon. Amici's argument that the state court's rulings were "wrongly decided" (Mot. for Leave, p. 3) is simply Ethicon's evidentiary sufficiency argument in disguise and is a transparent attempt to have this Court conduct a *de novo* examination of the trial court's findings of willful, bad faith discovery abuse. Finally, Amici's contention that a Montana court's interpretation of Montana procedural rules will "impose costly burdens" (Br. of Amici, p. 13) and otherwise have a drastic nationwide impact on the litigation strategies of manufacturers is nothing more than undocumented hyperbole.

REASONS TO DENY THE MOTION FOR LEAVE

Amici attempts to rationalize Ethicon's willful concealments by asserting that the discovery abuse related only to "contention interrogatories concerning negligence". (Mot. for Leave, p. 3) This assertion is untrue. The discovery propounded to Ethicon related to (1) specific affirmative defenses alleged by *Ethicon,* including, *but not limited to,* allegations of negligence, and (2) the critical issues of causation and the identity of persons who would testify on causation, *regardless* of negligence by Mungas.

The affirmative defenses alleged by Ethicon included the following:

TWELFTH DEFENSE

> Persons or entities other than this answering defendant were *careless, negligent or otherwise legally at fault. . . .*

THIRTEENTH DEFENSE

There were one or more *independent intervening causes* for any of the injuries or damages suffered. . . .

FOURTEENTH DEFENSE

Any injuries or losses suffered or sustained . . . [were] *caused,* wholly or at least in part, by misuse of this defendant's product. . . .

FIFTEENTH DEFENSE

The suture material described in Plaintiff's Complaint was altered or otherwise changed after said material left the custody and control of this defendant. . . . (EA 57)

Thus, both the issues of causation and of Mungas' negligence, were at issue, having been affirmatively alleged as defenses by Ethicon.

Eisenmenger and Mungas were entitled to, and did, inquire into the bases of Ethicon's affirmative defenses. The following are typical of the interrogatories propounded:

INTERROGATORY NO. 110: In your "[Twelfth] Defense" you indicate that persons or entities other than Ethicon, Inc., were *careless, negligent or otherwise legally at fault* for the damages alleged in plaintiff's complaint. As to this defense, please answer and identify:

a. Each such person or entity which or who was careless, negligent or otherwise legally at fault;

b. Each act or omission of each person or entity listed in your response to subparagraph "a" which

you contend constitutes carelessness, negligence or legal fault;

c. Every person who has any information to support your contention that the person or entity identified in your response to subparagraph "a" was careless, negligent or otherwise legally at fault;

d. Every document or tangible evidence which supports your contention that the person(s) or entity(ies) listed in your answer to subparagraph "a" was (were) careless, negligent or otherwise legally at fault;

e. Identify the custodian of the document(s) or tangible(s) identified in your response to subparagraph "d". (EA 87)[1]

* * * * * * *

INTERROGATORY NO. 1: Is it your contention that Defendant James E. Mungas *caused* or contributed to the injuries or damages allegedly suffered or sustained by the Plaintiff, as more fully described in her Complaint? If so, please set forth with particularity and in detail:

a. each and every fact supporting this contention;

b. the identity of any and all persons who could or would testify as to the truthfulness of this contention; and

c. the identity of all writings, notes, letters, records, or any other document which could or would support the truthfulness of this contention. (EA 121)

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[1]This interrogatory was originally propounded in the federal case, and was re-asked in the state case at Interrogatory 149A dated 1/12/90 and responded to by Ethicon on 6/29/90.

> *INTERROGATORY NO. 139:* From your review of the evidence in this case, including the deposition testimony, do you contend that an act or omission of Dr. Mungas *caused* or contributed to the stroke which Helen K. Eisenmenger suffered between 11:00 p.m. November 1, 1985 and 8:00 a.m. November 2, 1985. (EA 100)

These interrogatories, and others similar to them,[2] were propounded to Ethicon for more than three years. Clearly, they concern causation, not merely the negligence of Mungas. Ethicon repeatedly responded untruthfully (not merely "evasively" or "incompletely"). Ethicon did not abandon its affirmative defenses. To the contrary, Ethicon admitted that after concealing its causation evidence in order to obtain strategic advantage, it intended to use Olcott's causation testimony in its defense at trial. (EA 163-6; Supp. Br. of Defendant/Appellant Ethicon, Inc. dated 10/6/93)[3] As noted by the Montana Supreme Court, this is not a case where the "wrong" questions were asked and the "critical answers"

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[2]Numerous other interrogatories specifically sought Ethicon's information on causation and the identity of Ethicon's causation witnesses. *See, e.g.*, Interrogatories 127, 128A, 129, 129A, 133A, 134A, 135, 135A, 140, 140A, 147, 149A (EA 85-119), and Mungas Interrogatories 1 and 3 (EA 121-124).

[3]Both the trial court and the Montana Supreme Court recognized the strategic advantage to Ethicon from the use of the concealed evidence on the issue of causation, and even if it were not used to prove negligence by Mungas.

> . . . [A]s the District Court recognized and Ethicon admits, Ethicon would, if allowed, seek to use the concealed evidence at trial as relevant to causation. The concealed evidence clearly went to the heart of Ethicon's defense to Eisenmenger's claim. (p. 15a)

were merely "artfully avoided". There was "nothing more which could have been asked" in order to elicit the evidence. (p. 15a)

Amici asserts that it does "not believe that drug and device manufacturers should be required to contend that a given practice by a physician is negligent under local law, even if that opinion is harbored by the manufacturer's expert." (Br. of Amici, pp. 2-3)[4] This statement distorts the holding of the Montana courts. Nothing in the decisions of the Montana courts compels a manufacturer to adopt an unwanted litigation strategy or assert negligence against a doctor using its product. The holding of the Montana courts is simple and straightforward – when a litigant alleges that the injury was attributable to some other cause, the litigant must respond truthfully to discovery which elicits the litigant's evidence supporting the allegation. Failure to respond truthfully may be sanctioned under Rule 37(d) of the Montana Rules of Civil Procedure. If the litigant's conduct is willful and in bad faith, the trial court's discre-

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[4]In support of this statement, Amici asserts "there was no finding that Ethicon contended that Dr. Mungas was negligent . . ." (Br. of Amici, p. 10) and that "Ethicon decided in this case not to contend that Dr. Mungas was negligent. . . ." (Br. of Amici, p. 11) Both of these statements are untrue. Only one day *before* the trial court's imposition of sanctions, Ethicon submitted "Defendant's Contentions" for inclusion in the proposed Pretrial Order, which contentions included, nearly verbatim, Ethicon's affirmative defenses alleging negligence by Mungas, independent intervening cause, misuse and/or alteration of the product. (EA 163-166) Ethicon certainly did not disclose in its responses to the interrogatories that it had "abandoned" its affirmative defenses. Its claim of abandonment came as an afterthought and as a last ditch attempt to convince the trial court that it should be permitted to use the concealed evidence on the issue of causation.

tion to sanction under Rule 37(d) includes the power to grant default judgment on liability.

This holding is hardly novel. Rather it is similar to holdings in many other jurisdictions. As a rule of the Montana courts, the holding does not present a federal question. Nor does it bind the federal courts or the courts of any other state. Accordingly, Amici's forebodings of dire, nationwide consequences are exaggerated and unsupported by the record and certainly do not merit the certiorari jurisdiction of this Court.

CONCLUSION

For the foregoing reasons, the motion of Amici Curiae does not bring to the attention of the Court a federal question or other relevant matters that have not already been brought to its attention by the parties. Therefore, the Motion for Leave to File Brief Amici Curiae should be denied.

Respectfully submitted,

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